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U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

RAY H. SMITH, JR.,

Petitioner,

vs.

ERNIE MOORE, Warden

Respondent.

) **Case No. 1:05 CV 2041**

) **Judge Dan Aaron Polster**

) **MEMORANDUM OF OPINION**
) **AND ORDER**

Before the Court is the Report and Recommendation of Magistrate Judge James S.

Gallas issued on March 16, 2006 ("R & R") (ECF. No. 9). Petitioner Ray H. Smith, Jr. has filed a 28 U.S.C. § 2254 petition for writ of habeas corpus challenging the constitutionality of his convictions for aggravated murder, aggravated robbery and tampering with evidence. The petition alleges due process, equal protection, double jeopardy, ex post facto and ineffective assistance of counsel issues.

According to the R & R, the Magistrate Judge provided Smith with the opportunity to respond to the Magistrate Judge's concern over (1) the procedural default apparent on the face of the petition, and (2) the untimeliness of the petition under 28 U.S.C. § 2244(d). *See ECF No. 6.* Smith's 49-page response failed to provide a legally recognized cause to excuse the procedural default, and it also failed to establish a legitimate basis for tolling the applicable

one-year statute of limitations for filing a habeas petition. *See ECF No. 7.* The one-year period expired at the end of 2002 (at the latest) when the state appellate court denied Smith's motion to vacate the appellate judgment, and the time was not retriggered in 2004 when Smith resumed his efforts to appeal his convictions. Accordingly, the Magistrate Judge recommends that the petition be dismissed *sua sponte*.

Under the relevant statute:

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.

28 U.S.C. § 636(b)(1)(C) (1988) (emphasis added). Here, four weeks have elapsed since the R & R was issued, and neither an objection nor a request for an extension to file objections has been filed.

The failure to timely file written objections to a Magistrate Judge's report and recommendation constitutes a waiver of a *de novo* determination by the district court of an issue covered in the report. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985); *see United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

The Court has reviewed the Magistrate Judge's thorough and well-written Report and Recommendation (**ECF No. 13**) and hereby **ADOPTS** it. Accordingly, the underlying petition for writ of habeas corpus is **DENIED**.

IT IS SO ORDERED.



Dan Aaron Polster
United States District Judge